

STATE OF VERMONT
PUBLIC SERVICE BOARD

Docket No. 7394

Petition of Vermont Electric Power Company,)
Inc., and Vermont Transco LLC, for authority to)
condemn easement rights in property interests of)
David P. & Carrie T. Hathaway, the Vermont)
State Employees Credit Union, Countrywide)
Bank, and the Countrysides of Waterbury)
Homeowners Association, Inc. and its)
Individual Members, in Waterbury, Vermont,)
for the purpose of constructing the 115 kV)
transmission line portion of the so-called)
Lamoille County Project)

Hearing at
Montpelier, Vermont
April 16, 2009

Order entered: 8/20/2009

PRESENT: June E. Tierney, Esq.
Hearing Officer

APPEARANCES: Louise Porter, Esq.
for Vermont Department of Public Service

Frank H. Langrock, Esq.
Langrock Sperry & Wool, LLP
for David P. and Carrie T. Hathaway

Gary F. Karnedy, Esq.
Elijah D. Emerson, Esq.
Primmer Piper Eggleston & Cramer, PC
for Vermont Electric Power Company, Inc.
and Vermont Transco LLC

Kate Tremblay
Vermont State Employees Credit Union

I. INTRODUCTION

In this proceeding, Vermont Electric Power Company, Inc., and Vermont Transco LLC (together as "VELCO" or the "Petitioners"), request the Vermont Public Service Board ("Board"), pursuant to 30 V.S.A. §§ 110-124, to condemn an easement ("Proposed Easement") that is fully congruent with Green Mountain Power Corporation's ("GMP") existing 100-foot utility right-of-way located across property located in Waterbury, Vermont, owned by David P. and Carrie T. Hathaway (the "Landowners" or the "Hathaways"). The Proposed Easement is located in the existing utility corridor, occupies the same easement area on the Landowners' property and is necessary for the construction, operation and maintenance of VELCO's new 115 kV transmission line between Duxbury and Stowe, Vermont. This line is part of a coordinated series of improvements to the bulk power transmission system known as the Lamoille County Project ("LCP" or "Project"), which the Board approved on March 16, 2006, finding that the LCP was necessary to solve serious electric reliability problems in the region and to provide adequate and reliable transmission service to the State of Vermont and the systems with which it interconnects.¹

In this Proposal for Decision, I recommend that the Board grant the petition, condemn the easement across the Hathaway's property, subject to conditions consistent with those granted in other recent condemnations, and award the Hathaways \$39,000.00 in compensation.

II. PROCEDURAL HISTORY

On September 8, 2008, VELCO filed a condemnation petition pursuant to 30 V.S.A. §§ 110-124, along with direct prefiled testimony and exhibits. On January 16, 2009, VELCO submitted to the Board the direct prefiled testimony of its appraisal experts, to which was attached an appraisal for the property. Also included in this supplemental filing was a revised exhibit identified as "VELCO-Hathaway-3 (REVISED)."² On April 2, 2009, VELCO filed

1. *Petitions of Vermont Elec. Power Co., Inc., Green Mt. Power Corp. and the Town of Stowe Electric Department*, Docket 7032 (March 16, 2006).

2. VELCO-Hathaway-3 (REVISED) is a copy of the existing GMP transmission easement across the Hathaway's property. This revised exhibit replaced the original VELCO-Hathaway-3 document, which consisted of GMP easements for distribution and telephone service on the Hathaway's property.

additional pages of Exhibit VELCO-Hathaway-10, the Silver Appraisal Report, which had inadvertently been left out of the original filing.

Citations, as well as a copy of the petition, direct prefiled testimony, and exhibits were served upon all persons having a legal interest in the property, pursuant to 30 V.S.A. § 111(b), including all members of Countrysides of Waterbury Homeowners Association, Inc.³

Notice was given of a prehearing conference on December 9, 2008. The prehearing conference was convened at the Public Service Board Hearing Room, 3rd floor, Chittenden Bank Building, Montpelier, Vermont, on December 18, 2008, at which time the following appearances were entered: Louise Porter, Esq. and Sarah Hofmann, Esq., for the Vermont Department of Public Service ("Department" or "DPS"); Elijah Emerson, Esq., Gary Karnedy, Esq. and Victoria J. Brown, Esq., Primmer Piper Eggleston & Cramer, P.C., for VELCO; Frank H. Langrock, Esq., Langrock Sperry & Wool, LLP, for the Hathaways; and Kate Tremblay,⁴ on behalf of the Vermont State Employees Credit Union ("VSECU").

After notice, a site visit was conducted on January 8, 2009. The site visit was attended by representatives of all parties.

On January 23, 2009, DPS panel witnesses W. Steven Litkovitz and David Raphael filed direct testimony. Landowner Carrie T. Hathaway filed direct testimony on January 26, 2009. Additional direct testimony was filed by Landowner David P. Hathaway on January 28, 2009. VELCO filed rebuttal testimony on February 24, 2009.

Notice of a Technical Hearing was sent on March 13, 2009. The technical hearing was convened on April 16, 2009, at the Public Service Board Hearing Room, 3rd Floor, Chittenden Bank Building, in Montpelier, Vermont.

Prior to the technical hearing, the parties stipulated that they were not contesting the following issues: the necessity of the project; the necessity to locate the project on the Property,

3. None of the members of Countrysides of Waterbury Homeowners Association, Inc. participated in this proceeding.

4. Ms. Tremblay is not an attorney and therefore was treated as a *pro se* representative of VSECU pursuant to P.S.B. Rule 2.201(B). Ms. Tremblay did not attend the technical hearing, nor did VSECU otherwise actively participate in this proceeding.

and the impact on orderly development of the region and scenic preservation. 30 V.S.A. § 111(a) and § 112(3).⁵

III. LEGAL STANDARD

The statutory standard for condemnation is found at 30 V.S.A. Section 112, and reads, in pertinent part, as follows:

When the board finds:

(2) That the condemnation of such property or right is necessary in order that the petitioner may render adequate service to the public in the conduct of the business which it is authorized to conduct, and in conducting which it will, according to the laws of this state, be under an obligation to serve the public on reasonable terms, and pursuant to the regulations of the board;

(A) That the condemnation of the property or right will not unduly interfere with the orderly development of the region and scenic preservation.

(3) That the condemnation of such property or right is sought in order that the petitioner may render adequate service to the public in the conduct of such business, it shall adjudge the petitioner entitled to condemn such property or right, shall assess the compensation to be paid therefor, and shall determine the time and manner of such payment. That compensation shall be based upon the value of the property on the day the petition is presented to the board, and shall include as separate elements the value of the property taken, impairment to the value of remaining property or rights of the owner, and consequential damages including but not limited to the damage to the owner's business.

The findings and discussion below address these statutory requirements.

IV. FINDINGS

Based upon the substantial evidence of record and the testimony presented at the hearing, I hereby report the following findings of fact and conclusions of law to the Board in accordance with 30 V.S.A. § 8.

5. Tr. 4/16/09 at 6 (Karnedy) and 7 (Langrock).

A. Background

1. VELCO is a statutory "company" authorized to own and operate an electric transmission system in Vermont and empowered to condemn property subject to the Board's jurisdiction. Pet. at 1.

2. VELCO's business offices are located at 366 Pinnacle Ridge Road in Rutland, Vermont. Pet. at 1.

3. VELCO owns and operates most of the Vermont high voltage transmission network (115 kV and above), including the lines that serve northwestern and central Vermont. Pet. at 1.

4. VELCO holds a Certificate of Public Good ("CPG") to construct the Project, which was issued by the Board on March 16, 2006, in Docket No. 7032. Pet. at 2.

5. The LCP involves the construction of a 9.5-mile 115 kV transmission line largely within a right-of-way that currently exists for a 34.5 kV line that runs from Duxbury to Stowe, Vermont. From Duxbury to the Waterbury Reservoir, the 115 kV line will replace the 34.5 kV line. For the remainder of the Project, the 115 kV line will be in addition to the existing 34.5 kV line. In some locations the 34.5 kV and the 115 kV lines will be on separate structures and in other locations both circuits will be on the same structure. The transmission line will be located in a corridor that is, for the most part, 100 feet wide. VELCO Panel pf. at 7-8.

6. The Project also includes upgrades to an existing substation in Middlesex, the construction of a switching station in Duxbury, and the construction of a new substation in Stowe. VELCO Panel pf. at 8.

7. The Board approved the final design for the Project in an Order issued March 9, 2007, for all portions of the Project except for one area along Gregg Hill Road, the design for which was approved in an Order issued on May 16, 2007. VELCO subsequently reviewed the line design and on July 14, 2008, submitted a full set of plans and profile drawings for the LCP with certain design modifications. The Board approved that revised design by Order issued on August 21, 2008. Pet. at 2; Docket 7032, Orders of 3/9/07, 5/16/07 and 8/21/08.

8. This condemnation petition involves the property (the "Property") of David P. and Carrie T. Hathaway, located west of Route 100 at 351 Countryside Road in Waterbury, Vermont. VELCO Panel pf. at 1.

9. A 50-foot-wide portion of the 115 kV transmission line corridor will cross the Property. VELCO Panel pf. at 10; exh. VELCO-Hathaway-7.

10. The Property is currently burdened by an existing easement running to GMP and New England Telephone and Telegraph (the "GMP Easement"). VELCO Panel pf. at 5; exh. VELCO-Hathaway-3.

11. The Property is also subject to mortgages by Vermont State Employees Credit Union and Countrywide Bank (a Division of Treasury Bank, N.A.). VELCO Panel pf. at 5-6; VELCO-Cross-Hathaway-3 & 4.

12. The Property is also subject to covenants and restrictions in the Amended Protective Covenants and Restrictions in favor of the Countrysides of Waterbury Homeowners Association, Inc. VELCO Panel pf. at 5-6; VELCO-Cross-Hathaway-4.

B. The Proposed Easement

13. Currently, there exists an easement that was granted to GMP in 1949 for a 100-foot-wide transmission corridor on the Property. Exh. VELCO-Hathaway-3.

14. VELCO will acquire this existing easement from GMP; however, VELCO needs to obtain a few additional particular rights that are included in a proposed easement deed that VELCO attached to its petition (the "Proposed Easement"). VELCO Panel pf. at 12.

15. At present, a 100-foot-wide GMP 34.5 kV transmission line corridor runs along the westerly edge of the Property, but only 50 feet of the width of the corridor encroaches upon the Property, as the centerline of the corridor is congruent with the westerly edge of the Property. The existing easement area comprises 21,500 square feet or 0.494 acres of the Property. No new land will be condemned in connection with VELCO's plan to replace the existing 34.5 kV line with the proposed 115 kV line. Exh. VELCO-Hathaway-10 at 50; tr. 4/16/09 at 74 (D. Hathaway); exh. VELCO-Hathaway-7.

16. Two single-pole 34.5 kV structures presently are located in the existing GMP transmission corridor on the Property: one is approximately forty-five feet in height and the other is approximately fifty feet in height. VELCO will replace these two structures with two single-pole 115 kV structures approximately sixty-one feet and seventy-four and one-half feet in

height on the centerline of the existing corridor in the location of the existing two 34.5 kV structures. VELCO Panel pf. at 10; exh. VELCO-Hathaway-7; exh. VELCO-Hathaway-8.

17. VELCO designed the route for the 115 kV line crossing the Property to meet engineering, reliability, environmental and safety requirements and to minimize the number of structures along the right-of-way. VELCO Panel pf. at 10.

18. VELCO believes the scope of the property rights set forth in the existing GMP Easement may be ambiguous and may not be sufficient to cover the portion of the proposed construction of the 115 kV transmission line within the existing GMP right-of-way. Pet. at 4; exh. VELCO-Hathaway-3; exh. VELCO-Hathaway-9.

19. Unlike the existing GMP Easement, the Proposed Easement specifies the easement area and includes a complete description of allowable lines and equipment and trimming rights (including entry upon adjacent property to trim interfering "danger" trees). Additionally, the Proposed Easement establishes the right to "erect, construct, repair, maintain, reconstruct, relocate, operate and remove facilities for . . . the transmission and/or distribution of data, information, video and voice communications." VELCO Panel pf. at 12; exh. VELCO-Hathaway-9.

20. The Proposed Easement also contains the right to remove danger trees from the Property. "Danger trees," which are trees considered to be a threat to power lines or related structures, can be identified during routine line patrols, during routine maintenance, or when reported by landowners. It is critical that these trees are removed as soon as practicable after discovery for reliability and for the safety of the general public and the landowner. VELCO Panel pf. at 12-13; tr. 4/16/09 at 37-38 (Conn).

21. The Proposed Easement contains a general right to enter upon and cross the Property to gain access to the corridor across the Landowner's property. VELCO Panel pf. at 13; exh. VELCO-Hathaway-9.

22. The Proposed Easement incorporates the existing 100-foot-wide utility easement to be assigned to VELCO by GMP and reads as follows:

KNOW ALL PERSONS BY THESE PRESENTS: That David P. Hathaway and Carrie T. Hathaway, of the Town of Waterbury, County of Washington and State of Vermont (hereinafter, "Grantor," whether one or more), in consideration of One

Dollar and other valuable consideration paid by VERMONT TRANSCO LLC, (hereinafter, together with its successors and assigns, called "Grantee"), a Vermont limited liability company duly authorized and existing according to law, with its offices and principal place of business in the Town of Rutland, County of Rutland and State of Vermont, the receipt and sufficiency of which is hereby acknowledged, do hereby GRANT, BARGAIN, SELL AND CONVEY unto the said Grantee, its successors and assigns, a perpetual right-of-way and easement (a) to travel within for the purpose of reaching other properties, whether or not immediately adjacent, for the purpose of conducting monitoring, maintenance, construction or other activities, and (b) to erect, construct, repair, maintain, reconstruct, relocate, operate and remove facilities for the transmission and/or distribution of electricity and for the transmission and/or distribution of data, information, video and voice communications including wireless communication antennas and facilities (any of which facilities may be erected at different times and at such voltages and capacities as the Grantee may from time to time determine) including, but not limited to lines, wires, poles, towers, cables, foundations, anchors, guys, braces, fittings, equipment and other structures, whether over, upon or beneath a certain strip of land owned by the Grantor in the Town of Waterbury in the County of Washington and State of Vermont, hereinafter referred to as the "Easement Area", and bounded and described as follows:

An area of varied width adjoining the Grantor's westerly boundary common to land now or formerly of formerly of Ralph D. Gerlach, extending northeasterly from the Grantor's southerly boundary common to land now or formerly of Sharon A. Baade and Jane E. Olesen, to the Grantor's northerly boundary common to land now or formerly of James C. Matthews, more specifically defined and depicted on a survey plat entitled "Right of Way Plat Showing Easement to be Acquired from David P. and Carrie T. Hathaway, by Vermont Transco LLC, Town of Waterbury, Washington County, Vermont "dated January, 2008 by Coler & Colantonio, Inc. and filed as Slide #135 in the Town of Waterbury land records. The Easement Area contains 0.49 acres, more or less.

The foregoing Easement Area is a portion of the same lands and premises conveyed to Grantor by Warranty Deed of Joan D. Wheeler dated April 16, 1999 and recorded April 20, 1999 in Volume 163, page 489 of the Town of Waterbury land records.

The right of way and easement conveyed herein is subject to all rights of way and easements of record, and

a. Mortgage Deed of the Grantor to VT state Employees Credit Union dated October 31, 2003 and recorded November 6, 2003 in Volume 217, page 61 of the Town of Waterbury land records, and

b. Mortgage Deed of the Grantor to Countrywide Bank, a Division of Treasury Bank, N.A. dated July 3, 2004 and recorded in Volume 225, page 498 of the Town of Waterbury land records, and to all rights of way and easement of record.

Grantee shall have the continuing right, exercisable at any and all times, and from time to time, within said Easement Area to cut down, trim, burn, spray with chemicals, and to remove and keep cleared by such means as the Grantee deems desirable, including chipping and spreading of chips within the Easement Area, such trees, underbrush, and vegetation, or parts thereof growing within or overhanging such Easement Area as in the judgment of the Grantee may interfere with or endanger the efficient operation and use of said facilities (the first clearing may be for less than the full width and may be widened from time to time to the full width), and to remove all structures which are now found, or which may be subsequently placed on or within, such Easement Area in violation of the rights and privileges of the Grantee hereunder; and also with the right, by planting, trimming and by any other means, to control the growth of vegetation within such Easement Area.

Together, also, with the permanent right at any and all times to enter on adjacent lands of the Grantor and to cut or trim and remove such trees growing outside the limits of the Easement Area (Danger trees) which may, in the opinion of the Grantee interfere with or be likely to interfere with, the successful operation of the facilities now or hereafter to be constructed on said Easement Area.

This grant shall include the right to enter upon and cross other property owned by the Grantor for the purpose of gaining access to the Easement Area and of exercising any of the rights hereby conveyed; provided, however, that said rights must be exercised in a reasonable manner, and any damage to the property of the Grantor caused by the Grantee shall be borne by the Grantee.

The Grantor hereby covenants that no building, line, conduit, dam, levee, lake, pond, or any other structure or thing will be erected or placed within the limits of or upon the Easement Area, nor will any change in the grade or elevation of the Easement Area be made, which, in the judgment of the Grantee, might interfere with the exercise of the rights hereby granted. Notwithstanding the above, Grantee hereby acknowledges and agrees that this deed gives Grantor a temporary license to maintain the structure(s) or portions of structures either specifically pre-approved by Grantee for construction, or presently located within said Easement Area as identified on the recorded plat referenced above, and further agrees that these existing structure(s) may remain, provided, however, that in the event the existing structure(s) or portions thereof are removed, dismantled, destroyed or otherwise no longer exist, Grantor, together with its successors and assigns, shall not, and shall have no right to, rebuild the portion(s) of the structure(s) which encroaches within the Easement Area. Furthermore, no

modifications, additions or changes may be made to said structure(s) or portions thereof, without the prior written consent of Grantee. In the event the National Electrical Safety Code standards or other regulations governing the operation of Grantee's electrical facilities change, such that the existing encroachment(s) violates such standards or regulations, Grantee reserves the right to require the removal of the portion(s) of the structures which encroaches within the Easement Area.

Grantor reserves the right to cultivate or otherwise make use of said lands, including the right to cross and re-cross the Easement Area at such places as may be necessary or desirable in using the lands adjacent thereto, provided, that such use, crossing and re-crossing shall not interfere with the enjoyment or use of the rights, easement and estate hereby granted.

Subject to the condition below, no delay of Grantee in the use or enjoyment of any right or easement hereby granted or in constructing or installing any of the facilities in or along the right-of-way shall result in the loss, limitation, or abandonment of any of the right, title, interest, easement, or estate granted hereby.

This grant covers all the agreements and stipulations between Grantor and Grantee and no representations or statements, verbal or written have been made modifying, adding to or changing the terms or consideration for this grant.

The Grantee is further granted the right to assign to others, in whole or in part, any or all of the right-of-way, estate, interests, rights, privileges and easements herein granted.

TO HAVE AND TO HOLD the above granted rights and easements, with all privileges and appurtenances thereunto belonging, unto the said Grantee, its successors and assigns forever, to it and their own proper use, benefit and behoof. Grantor covenants with the Grantee that at and until the ensealing of these presents the Grantor is well seized of said premises as a good indefeasible estate in fee simple, and has good right to sell and convey the rights and easements aforesaid in the manner and form above written, and that the same are free from all encumbrances whatsoever, except as noted herein, and furthermore, the Grantor agrees to warrant and defend the same to the Grantee and its successors and assigns forever against all claims and demands whatsoever.

Exh. VELCO-Hathaway-9; VELCO Panel pf. at 12.

23. With the Landowners' permission, VELCO has completed the clearing on the Property necessary for construction of the 115 kV line. No trees were cleared from the Property outside of

the easement area except for two trees that the Landowners requested that VELCO remove. Tr. 4/16/09 at 38 (Conn); tr. 4/16/09 at 107 (C. Hathaway).

C. Necessity

24. Condemnation of the Property as proposed by VELCO is reasonably necessary in order to render adequate service to the public. Findings 25 through 33, below; Litkovitz and Raphael pf. at 4 (hereinafter "DPS Panel").

25. VELCO must obtain the right to use the Property in order to construct, operate, and maintain the Project as designed. VELCO Panel pf. at 11.

26. The Board found in Docket 7032 that "[w]ithout the proposed Project, the [Lamoille County Study Area] would face challenges in maintenance of existing facilities. Due to the weakness of the system and the projected load growth, it will become more difficult over time to test and maintain existing equipment." Docket 7032, Order of 3/16/06, at 55; VELCO Panel pf. at 9.

27. The Board also found that the existing subtransmission network in the area was not sufficient to ensure reliability, whereas the proposed Project would ensure such reliability. DPS Panel pf. at 4.

28. VELCO considered all reasonable transmission and distribution alternatives to the proposed Project. DPS Panel pf. at 4.

29. Despite multiple communications by VELCO representatives with the Landowner, VELCO has been unable to acquire the property interests without condemnation. VELCO Panel pf. at 11; VELCO-Cross-Hathaway-4.

30. VELCO evaluated alternative locations; it chose the current location because it believes it is consistent with Board policy that transmission lines be located in existing corridors. The Property is already subject to a GMP easement. Panel pf. at 11.

31. There is no overhead alternative that would be of shorter length, lower cost, or involve fewer poles. DPS Panel pf. at 5.

32. Underground placement of the transmission line is not warranted when an acceptable overhead alternative is available. DPS Panel pf. at 5.

33. The Landowners have stipulated to the necessity for this condemnation. Tr. 4/16/09 at 5-7, 9 (Karnedy/Langrock).

D. Orderly Development of the Region and Scenic Preservation

34. The Proposed Condemnation does not unduly interfere with the orderly development of the region or scenic preservation. Findings 35 through 46, below; DPS Panel pf. at 6.

35. Generally, the 115 kV line in this area is proposed to follow the existing 34.5 kV corridor. This route is consistent with Board policy to locate transmission lines in existing transmission corridors. VELCO Panel pf. at 15.

36. The Board's Order granting a CPG for the Project (issued on March 16, 2006) made explicit findings that the Project satisfies the orderly development and scenic preservation criteria. The Board approved the final design for this Project in its Order Re: Design Plans issued on August 21, 2008. VELCO Panel pf. at 15.

37. The proposed route does not unduly or directly affect any plans or land conservation initiatives of the Town of Waterbury or the Central Vermont Regional Planning Commission. DPS Panel pf. at 6.

38. The upgrade to the transmission line in the proposed location on the Property will not prevent or undermine the orderly development of the region. DPS Panel pf. at 6.

39. The impact to the lands has been minimized by the proposed siting of the Project and thus will not prevent adjacent and reasonable development in this area, which is situated within a Medium Density Residential Zoning District as designated by the Town of Waterbury. DPS Panel pf. at 6.

40. The Department's aesthetic witness David Raphael recommended that VELCO work with the Landowners "to develop a more extensive plan with regard to tree numbers and species, tree placement and with the use of increased sizes for more effective and timely results." DPS Panel pf. at 6.

41. On Friday, February 13, 2009, VELCO, the Landowners and representatives for the Department, including Mr. Raphael, met at the Property to discuss the impact of the new transmission structures, the impact of the clearing, and possible aesthetic mitigation to reduce

those impacts. As a result of this meeting, T.J. Boyle and Associates, VELCO's aesthetics consultant, developed a mitigation planting plan (the "Enhanced Mitigation Planting Plan"). The Enhanced Mitigation Planting Plan reflects the input of the Landowners and Mr. Raphael. VELCO Panel pf. reb. at 3; exh. VELCO-Hathaway-13; tr 4/16/09 at 39-41 (B. Conn); tr. 4/16/09 at 68-69 (Raphael).

42. The Enhanced Mitigation Planting Plan increases the effectiveness of the mitigation plan approved in Docket No. 7032 by adding screening for the views to the south, west and north. VELCO utilized both taller species such as hemlocks and shorter, and faster-growing shrubs to achieve this screening. Tr. 4/16/09 at 39-41 (Conn).

43. The Enhanced Mitigation Planting Plan has satisfied the Department's request for additional mitigation. Tr. 4/16/09 at 69 (Raphael).

44. The condemnation will have some visual aesthetic impacts to the Property. Not all of these impacts will be mitigated by the Enhanced Mitigation Planting Plan. Tr. 4/16/09 at 69 (Raphael).

45. The Enhanced Mitigation Planting Plan calls for a variety of trees to be planted that will take between five to forty years to reach their mature height. The plan also prescribes shrub plantings that will take between two to five years to mature. Tr. 4/16/09 at 42 (Conn); tr. 4/16/09 at 70 (Raphael).

46. The Enhanced Mitigation Planting Plan will not fully restore the Property to its condition prior to the construction of the 115 kV line. Tr. 4/16/09 at 70 (Raphael).

E. Compensation

47. The Property is comprised of a single-family dwelling situated on an approximately 1.71 acre parcel of land, with miscellaneous land improvements. The dwelling has an area of 2,639 sq. ft. Exh. VELCO-Hathaway-10 at 17.

48. VELCO's appraisers, Brian K. Silver and George F. Silver (the "VELCO Appraisers"), completed an appraisal in compliance with the Uniform Standard of Professional Appraisal Practice (USPAP) and the Uniform Appraisal Standards for Federal Land Acquisitions (Federal Standard). Exh. VELCO-Hathaway-10 (*Complete Self-Contained Appraisal Report of the David*

P. and Carrie T. Hathaway Property, Brian K. Silver and George F. Silver, dated May 19, 2008)(the "VELCO Appraisal").

49. The VELCO Appraisers are experienced in valuing the impact of partial interests in real estate, including the impact of transmission lines and easements on residential property. Exh. VELCO-Hathaway-10 at viii-xxv.

50. The VELCO Appraisers also conducted a comprehensive study on the impacts of transmission power lines on Vermont residential properties. Exh. VELCO-Hathaway-12, *Impact Study: Effect of Residential Property Price Due to the Presence of Electrical Transmission Line Easements*, Brian K. Silver and George F. Silver, dated June 26 2008 (the "Impact Study"); tr. 4/16/09 at 63 (G. Silver).

51. According to the VELCO Appraisers, there has never been a more comprehensive study of the impacts of power lines on property values in the State of Vermont than the Impact Study. Exh. VELCO-Hathaway-12; tr. 4/16/09 at 63 (G. Silver).

52. The VELCO Appraisal incorporates the conclusions from the Impact Study in appraising the Property. Exh. VELCO-Hathaway-10 at 62; tr. 4/16/09 at 63 (G. Silver).

53. The Project entails the upgrade of an existing 34.5 kV transmission line in an existing easement corridor to a 115 kV line, to be constructed along the existing centerline of the easement corridor. In the context of real-property appraisals, such circumstances give rise to an "easement-over-easement" valuation issue. Exh. VELCO-Hathaway-11 at 2; exh. VELCO-Hathaway-7.

54. The VELCO Appraisal assumes the hypothetical condition that the Property was free of the existing 34.5 kV transmission line and easement because there exists very little data dealing with the "easement-over-easement" valuation factor, i.e., for determining the impact that upgrading an existing transmission line in an existing transmission corridor would have on a property. Exh. VELCO-Hathaway-10 at xxxii; exh. VELCO-Hathaway-11, *Letter Re: Issue of "Easement-over-Easement" Valuation*; tr. 4/16/09 at 46, 59 & 56 (B. Silver).

55. The assumption in the VELCO Appraisal that the GMP transmission line and easement did not exist is a conservative appraisal approach that produced a maximum value for fair condemnation compensation due to the Landowners. Tr. 4/16/09 at 59-60 (B. Silver).

56. The Impact Study did not reveal any significant value-impact differential between the presence of different capacity transmission lines. The Impact Study examined two separate groups of properties, one set affected by a 34.5 kV transmission line, and one set affected by a 115 kV transmission line. The value reductions observed were relatively consistent across both transmission-line configurations. Exh. VELCO-Hathaway-11 at 2.

57. As the first part of the Impact Study, the VELCO Appraisers reviewed forty-two separate studies of the impact of transmission lines on residential properties. The studies reviewed, which include all of the studies on transmission-line impacts over a period of 25 to 30 years, included general discussions, attitudinal surveys, case studies and statistical analyses. Exh. VELCO-Hathaway-12 at 4; tr. 4/16/09 at 48-49 (G. Silver).

58. The reviewed studies indicated that, although high-voltage transmission lines "have the potential to reduce the value of proximate residential properties," these impacts "are not dramatic." Based on this literature review, the Impact Study concludes that "[t]he overwhelming evidence found within the collected and reviewed body of literature applicable to transmission line impacts on residential property values have indicated typical losses in the value varying between 2% to 10%." Exh. VELCO-Hathaway-12 at 7.

59. The Vermont-specific data analyzed for the Impact Study included a total of 624 transfers of property from Washington, Lamoille, and Chittenden counties. Twenty-five percent of those properties were encumbered with a transmission line. Exh. VELCO-Hathaway-12 at 11.

60. The Impact Study further includes a hedonic regression analysis on the collected data. A hedonic regression analysis is a method for estimating the likely "impact on price of a variety of characteristic and attributive statistics relevant to the residential real property market area." The focus of the hedonic analysis in this case was the variable of transmission lines. Exh. VELCO-Hathaway-12 at 13-14, 20.

61. The hedonic regression analysis indicated that transmission lines reduced the value of real property by 3.2 percent. Exh. VELCO-Hathaway-12 at 28.

62. The Impact Study also includes individual case studies. The case studies compared twelve properties that were encumbered with transmission lines with similar properties in the

area that were not encumbered by transmission lines. Exh. VELCO-Hathaway-12 at 32; tr. 4/16/09 at 50 (B. Silver).

63. The case studies revealed a reduction in value of properties that were encumbered by transmission lines of 0.73 percent to 10.25 percent, with a mean of 5.5 percent. Exh. VELCO-Hathaway-12 at 35.

64. The ultimate conclusion reached in the Impact Study is that the overall "impact on residential property prices due to the presence of electrical transmission line easements is estimated to be in the range of approximately 0.5 percent to approximately 9.25 percent, with a central tendency in the vicinity of approximately 4.5 percent." Exh. VELCO-Hathaway-12 at 36.

65. In the case of the Hathaways, the value of the Property is reduced by 8 percent by the impact of VELCO's proposed easement and associated transmission line, assuming the Property were not currently burdened by the existing GMP easement and transmission line. Exh. VELCO-Hathaway-10 at 62.

66. The 8 percent value lies at the high end of the range established by the Impact Study, but is appropriate because of the proximity of the line, the size of the line and the fact that the Landowners' house is a high-end home. Tr. 4/16/09 at 47, 49 (B. Silver); exh. VELCO-Hathaway-10 at 62.

67. The VELCO Appraisal measures the impact of the condemnation by estimating the value of the Property prior to the proposed electric utility easement (the "before" value) and subtracting the value of the Property immediately after the easement (the "after" value). The "before" value was determined as of May 19, 2008. Exh. VELCO-Hathaway-10 at 22.

68. The highest and best use of the Property is as a single-family rural residential property, which is its current use. Exh. VELCO-Hathaway-10 at 31.

69. The highest and best use of the Property after the condemnation would remain as a rural residential property. Exh. VELCO-Hathaway-10 at 61.

70. The VELCO Appraisal uses both the Cost Approach to value and the Sales Comparison Approach to value. Exh. VELCO-Hathaway-10 at 32 & 38.

71. The Cost Approach to valuation estimates the reproduction costs of new development, and then subtracts the accrued depreciation from all causes. The estimated values of the land and

land improvements are then added to come up with the market value of the property. Exh. VELCO-Hathaway-10 at 32.

72. The Sales Comparison Approach to valuation uses available data on recent sales of properties to determine the amount a comparable property would sell for if it were exposed to the open market for a reasonable length of time. This is the "most effective and reliable approach" to value properties similar to the subject property. Exh. VELCO-Hathaway-10 at 38.

73. Based on the Cost Approach and the Sales Comparison Approach to valuation, the "before" value of the Property is \$485,000. Exh. VELCO-Hathaway-10 at 36 and 48.

74. The "before" value established in the VELCO Appraisal does not reflect the pre-existing decrease in the value of the Property based on the existing GMP 34.5 kV subtransmission line and easement. Finding 54, above; exh. VELCO-Hathaway-10, generally.

75. Using the analysis from the Impact Study, the VELCO Appraisal concludes that the value diminution to the Property due to the Project is 8 percent or \$38,800 ($\$485,000 \times 8 \text{ percent} = \$38,800$). Exh. VELCO-Hathaway-10 at 63 and 66.

76. Under the Sales Comparison Approach used in the VELCO Appraisal, the "after" value of the Property after the condemnation would be \$446,000 ($\$485,000 - \$38,800 = \$446,200$, rounded down to the nearest thousand). The Cost Approach yielded a very similar "after" value of \$445,000. As between the two valuation approaches, the Sales Comparison Approach is the most reliable indicator of the "after" value of the Property. Exh. VELCO-Hathaway-10 at 63, 66 and 69.

77. The VELCO Appraisal concludes that the total indicated just compensation for the reduction in value of the Property due to condemnation is \$39,000 ($\$485,000 - \$446,000 = \$39,000$). Exh. VELCO-Hathaway-10 at 69 and 71.

78. The VELCO Appraisal allocates the \$39,000 diminution in value between takings damages (\$13,585) and severance damages (\$25,415). Exh. VELCO-Hathaway-10 at 71.

79. The takings damages of \$13,585 do not reflect the pre-existing diminution of the value of the Property due to the existing GMP easement and the 34.5 kV subtransmission line. Findings 54 and 74, above.

80. In the case of an "easement-over-easement" valuation, the actual damages to the property are nominal. Exh. VELCO-Hathaway-11 at 2.

81. In the case of the Hathaways, the value impact on the Property due to the "easement-over-easement" facet of the Project would be a small fraction of the value impact on the Property that would result if this case instead dealt with introducing an entirely new power line easement where none had existed previously. Exh. VELCO-Hathaway-11 at 3.

82. The Landowners did not claim any consequential damages. VELCO-Cross-Hathaway-4.

83. The Landowners maintain that the "before" value of the Property is \$650,000. Their assessment of the Property's value dates to 2003, when their house was constructed. Their assessment does not reflect the value of the Property at the time of the filing of the condemnation petition. D. Hathaway pf. at 2; tr. 4/16/09 at 71, 73 (D. Hathaway).

84. The Landowners did not determine the value of the Property at the time they filed their prefiled testimony in January of 2009. Tr. 4/16/09 at 73 (D. Hathaway).

85. The recent economic downturn has decreased the value of the Property. The Landowners believe the economic recession has reduced the value of the Property by \$60,000. Tr. 4/16/09 at 77 (D. Hathaway).

86. The Landowners' "before" value is not based on any comparable sales of other properties during the time of the filing of the petition. Rather, it is based on conversations with construction contractors dating to 2003, around the time of construction of the Hathaways' house. Tr. 4/16/09 at 78 (D. Hathaway).

87. The Landowners cite the sale of a property in Stowe for \$495,000 as a basis for their opinion as to the "before" value of the Property. Tr. 4/16/09 at 99-100 (D. Hathaway).

88. The cited property in Stowe is not a comparable sale. The cited property was sold in 2003 and comprises nearly twice as much land (3.14 acres) at a location far from the Hathaway's neighborhood. Tr. 4/16/09 at 134-135 (B. Silver).

89. The Landowners believe that the VELCO 115 kV transmission line and easement will decrease the value of the Property by \$250,000, which amounts to a 38 percent reduction on the value of their home. D. Hathaway pf. at 2; tr. 4/16/09 at 77 (D. Hathaway).

90. The Landowners do not believe that the existing GMP easement and 34.5 kV line have decreased the value of the Property. Tr. 4/16/09 at 88 and 91 (D. Hathaway).

91. The Landowners have produced no data to support either their conclusion that the "after" value of the Property is \$400,000 or that the VELCO 115 kV line and easement will reduce the value of the Property by 38 percent. Tr. 4/16/09 at 78 (D. Hathaway).

V. DISCUSSION

The Board has previously found that the LCP is essential to maintaining reliability of the transmission system in Vermont and, in particular, the areas served by the Project. In this proceeding, the evidence also demonstrates that granting VELCO an easement across the Property to enable it to construct the LCP is reasonably necessary to provide adequate transmission services. VELCO's proposed route was developed so as to use existing transmission corridors to the extent possible, thus minimizing the incremental impact of the construction. No reasonable alternative to the proposed route has been identified and the route is consistent with orderly development of the region, principles for protecting scenic preservation, and the Board's policy of building transmission lines within existing corridors.

The Proposed Easement Deed Language

No party has opposed VELCO's proposal as set out in Exhibit VELCO-Hathaway-9, except for the issue I discuss below regarding the grantor warranty language. Apart from this warranty language, I find that the terms and conditions described in VELCO's proposed deed are generally reasonable and recommend that the Board accept them subject to the modification set out below. The rights set out in the proposed easement are reasonably necessary to allow VELCO to maintain and access the easement area, thereby allowing it to provide adequate transmission services year round.

The Warranty Language

Turning to the warranty language, VELCO's proposed easement deed states that:

Grantor agrees to warrant and defend the same to the Grantee and its successors and assigns forever against all claims and demands whatsoever.⁶

VELCO maintains it is appropriate for the easement deed to contain this warranty language because the Hathaways have "fully participated in this action" and have stipulated to necessity and other matters.⁷ The Department, however, takes issue with VELCO's reasoning, arguing that the controlling factor in determining the appropriate deed language is the landowner's lack of consent to the transfer, which has necessitated condemnation, and not the fact or degree of the landowner's participation in the ensuing condemnation proceeding.⁸

Recently, in Docket 7387, the Board considered the same language in a deed proposed by VELCO. In response to an inquiry from the Board in that proceeding, VELCO assented to inclusion of language in the nature of a quit claim, rather than a warranty and the Board adopted the following language in lieu of VELCO's proposal.⁹

The easement above will subject whatever interest the Grantor might have in and to the described parcel to its conditions.

I recommend that the Board do the same here. By including language in the nature of a quitclaim deed, the Board is recognizing the involuntary nature of the easement that is being condemned over the Hathaways' objection. VELCO's argument that warranty language is appropriate when a condemnee participates in the condemnation proceeding has the undesirable effect of creating a disincentive for landowners to appear and defend against a condemnation action. Under VELCO's reasoning, the landowner would be better served by simply sitting out the process and receiving a condemnation order containing language in the nature of a quitclaim deed. The

6. Exh. VELCO-Hathaway-9 at 3.

7. VELCO Proposal For Decision dated May 1, 2009, at 13.

8. DPS Reply Brief dated May 15, 2009, at 1. The Landowners have expressed no clear position on the issue of the proposed warranty language. While they stipulated to the admission of Exh. VELCO-Hathaway-9, that stipulation expressly left "open for briefing whether or not that deed should be revised in any fashion." Tr. 4/16/09 at 66 (Karnedy/Langrock). Thereafter, the Landowners filed a brief on May 1, 2009, but did not address the issue.

9. Docket 7387, Order of 1/29/09 at 11. This same language also was ordered by the Board and adopted by VELCO in Docket 7395. See Docket 7395, In re Petition of VELCO (Spur), 3/26/09 at 11.

Board should not adopt a rule that potentially discourages landowners from exercising their due process rights.

The Telecommunications Facilities Language

The easement deed as proposed by VELCO is phrased very broadly in terms of the electrical and telecommunications facilities that VELCO may place.¹⁰ As the Board has previously observed, the rights that VELCO acquires through the condemnation are those for which it has demonstrated a necessity.¹¹ The same conclusion should apply here. Accordingly, I recommend that the Board include in its order the following condition:

The easement shall authorize Vermont Transco LLC to install fiber-optic facilities. Vermont Transco LLC shall not be authorized by this easement to sell, lease, exchange, or otherwise transfer any excess capacity in any data transmission facilities it installs in the easement expansion which is authorized by this Order, except that Vermont Transco LLC may trade the excess capacity to the extent permitted by the Vermont Supreme Court's decision in *Grice v. Vermont Elec. Power Co., Inc.*, 2008 VT. 64 (2008).

Scrivener's Errors

The Proposed Easement deed as reflected in Finding #22, above, contains several typographical errors. The second paragraph contains a redundant reference to land "of formerly" of Ralph D. Gerlach. In Paragraph "a" the reference to "VT state Employees Credit Union" should be corrected to capitalize the word "State." Paragraph "b" refers in the singular to an "easement of record" that should be pluralized and read "easements of record." The third paragraph after paragraph "b" contains a subclause that is missing a comma after the words "in the opinion of the Grantee." I therefore recommend that VELCO be required to submit a revised, corrected version of the Proposed Easement deed as a compliance filing.

Compensation

Pursuant to 30 V.S.A. § 112(4), compensation for a condemnation of private real property rights "shall be based upon the value of the property on the day the petition is presented to the board, and shall include as separate elements the value of the property taken, impairment to the

10. Exh. VELCO-Hathaway-9 at 1.

11. See *Petition of Vermont Transco LLC*, Docket 7302, Order of 2/21/08 at 25–26; *Petition of Vermont Transco LLC*, Docket 7295, Order of 10/13/08 at 23–25, 28–29.

value of the remaining property or rights of the owner, and consequential damages."¹² At issue in this proceeding are the first two types of compensation cited in Vermont's condemnation statute, namely, "takings damages" and "severance damages." The term "takings damages" refers to the compensation the owner receives for any property actual taken through condemnation, such as a strip of land, while the term "severance damages" describes the compensation awarded for the impairment, if any, of the value of the owner's remaining property after the condemnation.¹³ When added together, these different damages components constitute the "total just compensation" due to the owner for the condemnation. Finally, compensation, in the context of condemnation proceedings, is measured by the "difference between the value of the whole parcel immediately before the taking and the value of the remaining part immediately after the taking."¹⁴

VELCO's Proposed Easement creates easement rights that are substantially similar to those already granted by the GMP Easement that VELCO will acquire. Both easements occupy the same easement area and provide the right to clear and keep clear a 100-foot-wide corridor with the right to access the Property to construct and maintain lines for transmission of high- and low-voltage electricity and telephone service. Nonetheless, the Proposed Easement does contain some new rights that evidently have necessitated this condemnation and which are compensable to the Hathaways as a takings – specifically, a clearly stated right to cut danger trees and an express right to install telecommunications facilities of a nature that was not contemplated in 1949 when GMP first acquired its transmission easement across the Property.

In this case, VELCO and the Landowners have presented two vastly differing opinions on the value of the Property prior to condemnation and the impact of the VELCO 115 kV transmission line and easement. The Landowners argue that they are due \$250,000 in total just compensation, while VELCO maintains that only \$25,415 is warranted, notwithstanding that

12. Docket 7437, *Petition of Central Vermont Public Service Corporation for authority to condemn easement rights in property interests of Michael Bladyka, located in Weathersfield, Vermont*, Order of 3/16/09 at 7.

13. The third type of compensation contemplated by Vermont's condemnation statute, consequential damages, is not at issue in this case, as neither party has made a claim that such compensation is due. When consequential damages are awarded, they are for compensable harm caused in the course of execution of the condemnation.

14. Docket 7437, *Petition of Central Vermont Public Service Corporation for authority to condemn easement rights in property interests of Michael Bladyka, located in Weathersfield, Vermont*, Order of 3/16/09 at 7.

VELCO's expert appraisal witnesses have testified that \$39,000 is the total just compensation due. For the reasons discussed below, I conclude that the total just compensation due for condemnation in this case is \$39,000.

Turning first to the Landowners' position on compensation, I do not find persuasive the evidence that the Landowners presented in support of their position on compensation. The Landowners' compensation claim rests on Mr. Hathaway's testimony regarding the "before" and "after" value of the Property. Vermont law provides that in condemnation proceedings, a landowner is competent to testify as to the value of the Property. 12 V.S.A. § 1604. However, "a factfinder is not obliged to accept or give any particular weight to a landowner's testimony on any and all property-related valuation issues."¹⁵ Mr. Hathaway has no education or training in the valuing of real estate, or utility-line impacts on real estate values. Although Mr. Hathaway owns a construction business, that business specializes in commercial real estate and is not involved in the buying or selling of real estate.¹⁶

Mr. Hathaway's "before" value of \$650,000 was based on his opinion and discussions with fellow construction contractors. There was no evidence of any specific properties that the Landowners used to determine this value, nor was there any evidence that the value was based on actual sales. Moreover, Mr. Hathaway testified that his "before" value of \$650,000 dated to the time of construction of the house on the Property in 2004. He further testified that the ensuing economic downturn has negatively affected the real estate market and that it has likely decreased the value of the Property by approximately 9 percent, which would reduce his estimate to \$590,000.

Nor was the Landowners' valuation of the impact of the easement and transmission line to the Property supported by any objective data. First, the Landowners maintain, without any supporting evidence, that the existing GMP easement and 34.5 kV subtransmission line have had no diminishing impact at all on the value of the Property. Furthermore, the Landowners provided no verifiable data support for their claim that upgrading an existing line in an existing corridor

15. Docket 7297, *Petition of Vermont Transco LLC, for authority to condemn easement rights in property interests of Peter P. Markowski and C. Elizabeth Markowski*, Order of 3/27/08 at 28, citing *Johnson v. Johnson*, 158 Vt. 160, 164 (1992), and *In re Patch*, 140 Vt. 158, 173 (1981).

16. Tr. 4/16/09 at 82-83 (D. Hathaway).

would reduce the value of the Property by 38 percent. Nor did the Landowners use any comparable sales data or perform any independent research to confirm this percentage decrease in value. For these reasons, I decline to adopt the Landowners' proposal to award \$250,000 in total just compensation for condemnation in this case.

By comparison, I find more compelling the evidence supporting the opinion of the VELCO Appraisers that a total just compensation award of \$39,000 is due the Hathaways, notwithstanding VELCO's advocacy in favor of limiting the award to \$25,415 in severance damages.

The uncontested evidence in this record shows that both the VELCO Appraisal and the Impact Study were constructed by seasoned appraisal experts using the conventional data and methods commonly employed in their discipline.¹⁷ A hypothetical condition was employed in crafting the VELCO Appraisal, namely, the assumed absence of the existing 34.5 kV line. The use of such hypothetical assumptions is an accepted practice among licensed appraisers.¹⁸ The VELCO Appraisers had good cause for assuming the absence of the existing 34.5 kV line in preparing their appraisal: their research revealed very little sales data to measure the impact on the value of a property with an easement over an existing easement – commonly referred to as an "easement-over-easement" condition. To bridge this data gap concerning "easement-over-easement" value impacts, the VELCO Appraisers produced the Impact Study and used their expert judgment to devise a reasonable means to appraise the Property that would be fair to the interests of the Hathaways. Under these circumstances, I conclude that it was reasonable for the VELCO Appraisers to close the data gap confronting them in appraising this "easement-over-easement" scenario, and that assuming the absence of the existing 34.5 kV line not only was a reasonable means for bridging the gap but also was fully fair to the Landowners.

In assuming at the outset of their appraisal analysis that there was no pre-existing GMP easement and subtransmission line on the Property, the VELCO Appraisal produced a "before" value of \$485,000 that in the first instance did not account for these pre-condemnation facts. These facts were accounted for later by using the Impact Study results to determine that the value

17. Exh. VELCO-Hathaway-10 at vii - xxv.

18. Exh. VELCO-Hathaway-10 at xxxi-xxxii.

of the Property would be reduced by 8 percent due to the presence of the 115 kV transmission line after condemnation. Thus, applying this 8 percent figure to the "before" value produced an "after" value for the Property of \$446,000,¹⁹ which resulted in a total compensation figure of \$39,000.²⁰ Having calculated a total just compensation sum of \$39,000, the VELCO Appraisers allocated this sum between takings damages of \$13,585 and severance damages of \$25,415.

In its Proposal for Decision, VELCO argues against the \$39,000 award recommended by its own expert witnesses. VELCO characterizes the \$39,000 figure as a "ceiling" that represents the maximum amount of total just compensation that is supported by the VELCO Appraisal, but not the amount that is actually justified given the reality of the pre-existing 34.5 kV line that presently encumbers the Property – a value-diminishing factor that the VELCO Appraisers did not take into account when they calculated the "before" value of \$485,000. Thus, VELCO maintains, awarding the full \$39,000 would effectively result in a second payment for the taking that occurred when GMP installed the 34.5 kV line on the Property – an outcome that, according to VELCO, would contravene Vermont condemnation law, as landowners are only entitled to be compensated once, and not twice, for the same taking.²¹ Therefore, VELCO contends, either no takings damages at all are due the Hathaways, or, in the alternative, only a nominal takings award is warranted because the "easement-over-easement" upgrade of the 34.5 kV line to a 115 kV line will not produce a significant value impact differential on the Property as between the presence of a 34.5 kV line and a 115 kV line.²²

However logical VELCO's argument may be in seeking to reduce the \$39,000 award recommendation to "a small fraction" thereof, the evidentiary record is bereft of any support for awarding an alternative, lower sum without resorting to impermissible speculation.²³ The VELCO Appraisers observed after issuing their appraisal that "the question remains as to the

19. $\$485,000 - (485,000 \times 8 \text{ percent}) = \$446,200$, rounded down to \$446,000.

20. $\$485,000 - \$446,000 = \$39,000$.

21. See VELCO Proposal for Decision at 24-5, citing *Proctor v. Central Vermont Public Service Corp.*, 116 Vt. 431, 434 (1951).

22. See Finding #56, above, and exh. VELCO-Hathaway-11 at 2.

23. *Howley v. Kantor*, 105 Vt. 128, 133 (1933)("[c]onsequences which are contingent, speculative or merely possible are not entitled to consideration in ascertaining damages"). This rule against speculative damages applies in the condemnation context. See, e.g., *Mazza v. Agency of Transp.*, 168 Vt. 112, 119 (1998)("[t]he evidence must be sufficient to allow an estimation of fair market value 'with reasonable certainty' and to avoid speculation.")

specific degree to which additional 'easement-over-easement' will negatively impact the market value of the property already encumbered by an existing easement."²⁴ The closest the VELCO Appraisers came to identifying this incremental amount of diminished market value was to conclude that the Hathaways are entitled to compensation amounting to a "small fraction of the impact" on the Property "due to a new easement where none had existed previously."²⁵ But the VELCO Appraisers made no attempt to actually quantify the diminution of the Property value that is properly attributable to the "easement-over-easement" impact. Thus, as the evidentiary record does not contain a basis for awarding total just compensation with reasonable certainty in any amount short of the \$39,000 recommended in the VELCO Appraisal, I conclude that the only reasonable award supported by this evidentiary record is the sum of \$39,000 established by the VELCO Appraisal as the total just compensation that is due the Hathaways, with \$13,585 allocated to takings damages and \$25,415 to severance damages.²⁶

Neither Party presented evidence concerning consequential damages, therefore I find none are warranted.

VI. CONCLUSION

VELCO has established that the Proposed Easement is reasonably necessary to provide adequate transmission service. VELCO further has demonstrated the necessity for expanding the scope of the property rights beyond those contained in the existing GMP easement to cover the construction of the Project within the existing right -of-way. The Project complies with orderly development of the region, principles for protecting scenic preservation, and the Board's policy of building transmission lines within existing corridors.

Further, the maintenance and access rights set out in VELCO-Hathaway-9 are reasonably necessary to allow VELCO to maintain and access the easement area, thereby allowing it to

24. Exh. VELCO-Hathaway-11 at 2.

25. *Id.*

26. VELCO's citations to other recent Board condemnation orders as authority for "limiting compensation where there is a pre-existing transmission right of way" are to no avail. VELCO Proposal for Decision at 24. For one, condemnation proceedings are fact-specific in nature and are subject to *de novo* review. Furthermore, unlike in this proceeding, the cases cited by VELCO all featured an evidentiary record that foreclosed an award of takings damages or permitted such damages to be specifically calculated. In this case, VELCO's experts have neither ruled out takings damages, nor have they offered a specific calculation of such damages.

provide adequate transmission services year round. The remaining rights set out in VELCO-Hathaway-9 are reasonably necessary as well, subject to the following conditions as discussed above and which I recommend that the Board impose in its final order: (1) VELCO must strike the existing warranty language in the Proposed Easement deed and replace it with the language set forth above that is in the nature of a quit claim; and (2) VELCO's right to install and maintain telecommunications facilities in the easement area on the Property shall extend only as far as is consistent with the holding of the Vermont Supreme Court's decision in the *Grice* case.

Finally, the evidence has shown that the total just compensation due for the condemnation is \$39,000, with \$13,585 allocated to takings damages and \$25,415 to severance damages. Findings proposed and arguments made by any party that are inconsistent with this Proposal for Decision are hereby rejected.

This Proposal for Decision has been served on all parties to this proceeding in accordance with 3 V.S.A. § 811.

Dated at Montpelier, Vermont, this 10th day of August, 2009.

s/June E. Tierney
June E. Tierney, Esq.
Hearing Officer

VII. BOARD DISCUSSION

On August 3, 2009, VELCO filed a revised proposed easement deed to add language in the nature of a quitclaim deed and to correct the typographical errors discussed in the Hearing Officer's Proposal for Decision ("PFD") at pages 20-21. We have reviewed the revised proposed easement deed and find it acceptable, except we require one additional change: in the first sentence of the second full paragraph on page 2 of the revised proposed easement, the word "covenants" should be struck and the sentence revised using language that is consistent with a quitclaim deed.

VELCO further requests confirmation that the proposed ordering clause in the PFD will be satisfied if the easement deed does not include a metes and bounds description, but instead contains a general summary of the boundaries of the easement area along with a reference to a survey plat on file in the Waterbury land records. We agree that VELCO's suggested approach for describing the easement area in the easement deed is a reasonable means of satisfying the Hearing Officer's recommendation that we require "a legal description of the easement area" to be included in the easement deed.

VIII. ORDER

IT IS HEREBY ORDERED, ADJUDGED AND DECREED by the Public Service Board of the State of Vermont that:

1. The findings, legal conclusions and recommendations of the Hearing Officer are adopted.
2. The Petitioners, Vermont Electric Power Company, Inc., and Vermont Transco LLC, are entitled and authorized to condemn the easement that is the subject of these proceedings and described in this Order.
3. The total compensation to be paid for the easement on the Hathaway property, to reflect the value of the property taken, the impairment to the value of the remaining property, and consequential damages, based on its value as of May 19, 2008, is as follows: \$39,000.00.
4. Full payment of compensation shall be made to David P. and Carrie T. Hathaway within thirty (30) days of the date of this Order.

5. Tender of payment of compensation shall precede the recording of a certified copy of these Findings and Order in the Town Clerk's Office of the Town of Waterbury, Vermont.

6. The easement shall authorize Vermont Transco LLC to install fiber-optic facilities. Vermont Transco LLC shall not be authorized by this easement to sell, lease, exchange, or otherwise transfer any excess capacity in any data transmission facilities it installs in the easement expansion which is authorized by this Order, except that Vermont Transco LLC may trade the excess capacity to the extent permitted by the Vermont Supreme Court's decision in *Grice v. Vermont Elec. Power Co., Inc.*, 2008 VT. 64 (2008).

7. Petitioners shall file a revised easement deed consistent with this Order, including the corrections described in this Order, as well as a legal description of the easement area, with the Public Service Board and other parties within two weeks of the date of this Order.

Dated at Montpelier, Vermont, this 20th day of August, 2009.

<u>s/James Volz</u>)	
)	
)	PUBLIC SERVICE
<u>s/David C. Coen</u>)	
)	
)	BOARD
)	
)	OF VERMONT
<u>s/John D. Burke</u>)	

OFFICE OF THE CLERK

FILED: August 20, 2009

ATTEST: s/Susan M. Hudson
Clerk of the Board

NOTICE TO READERS: This decision is subject to revision of technical errors. Readers are requested to notify the Clerk of the Board (by e-mail, telephone, or in writing) of any apparent errors, in order that any necessary corrections may be made. (E-mail address: psb.clerk@state.vt.us)

Appeal of this decision to the Supreme Court of Vermont must be filed with the Clerk of the Board within thirty days. Appeal will not stay the effect of this Order, absent further Order by this Board or appropriate action by the Supreme Court of Vermont. Motions for reconsideration or stay, if any, must be filed with the Clerk of the Board within ten days of the date of this decision and order.